IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.390 OF 2002

Bashirkhan Abbaskhkan Pathan .. Applicant

versus

The State of Maharashtra .. Respondent

...

Mr.Naveen Chomal for the appellant.

Mr. D.P.Adsule for the respondent.

CORAM : V.M. KANADE, J

DATED : 16th October 2004.

ORAL JUDGEMENT: -

1. The appellant is challenging the judgement and order passed by the third Addl. Sessions, Judge, Nashik in Spl. Case no.36 of 1998. In the said judgement and order, the Addl. Sessions Judge by his judgement dated 11th December 2001 convicted the appellant original accused u/s.18 of the Narcotics Drugs and Psychotropic Substances Act 1985

and sentenced him to suffer RI for 10 years and to pay fine of Rs.1,00,000/- and in default of fine to suffer RI for two years. The accused was further convicted u/s.22 of the NDPS Act and sentenced to suffer RI for 10 years and to pay fine of Rs.1,00,000/- in default to suffer RI for two years and the appellant was also convicted u/s.56(1)(b) of the Bombay Prohibition Act and was sentenced to suffer RI for three years and to pay fine of Rs.500/- and in default to suffer RI for 15 days.

2. The prosecution case is that on 26th June 1998, the Investigating Officer received information that the appellant was going to come at Sarda Circle at about 2 to 2.30 a.m. Accordingly, information was recorded in writing. Entry was made in the Station diary. Both these documents were sent to the Dy. Commissioner of Police, Zone-I. Panchas were called. Search of the leading party was also taken and they kept a watch on the place where the accused was going to visit at 2.00 a.m. Accordingly, at 2.30 a.m, they saw the appellant who was carrying a plastic bag. He was told that they wanted to take personal search and also searched the plastic bag and asked him whether the search should

be made in the presence of the Magistrate or the Gazetted Officer. When the accused declined to accept the offer made, a written note was prepared to that effect and thereafter, it was searched. On taking inspection of the plastic bag, opium of about 500 gms was found and 135 gm of gard was found. Similarly, dry Bhang was found in four small cotton bags each weighing one kilo. Accordingly, panchnama was made. The accused was arrested. Statements of the witnesses were recorded. Charge-sheet was filed. Charge was framed. The trial Court convicted the accused on the basis of the evidence adduced by the prosecution. Against the said order, the appellant has preferred this appeal.

3. It is submitted by the learned counsel appearing on behalf of the appellant that the provisions of section 50 of the NDPS Act has not been complied as the offer to be searched by a Magistrate was not properly made and signature of the appellant was obtained on a document in which the offer to be searched by a Magistrate was written in Marathi language. It was submitted that the appellant did not understand Marathi language and therefore, the provisions of section 50 of the NDPS

Act had not been complied. It was further submitted that the provisions of section 42(2) of the NDPS Act has not been complied. It was submitted that the documents were prepared subsequently at the later stage. It was thereafter submitted that the provisions of section 52 to 57 of the NDPS Act has not been complied and therefore, it is created as severe ..... about the veracity of the prosecution case. He submitted that the accused was entitled to give the benefit of doubt and the order of the trial Court be set aside. The learned APP vehemently opposed the submissions made by the learned counsel appearing on behalf of the accused. He submitted that trial Court has given cogent reasons for convicting the accused. He submitted that there was due compliance of the provisions of section 42, 50 and sections 52 to 57 of the NDPS Act.

4. The learned counsel appearing on behalf of the appellant has taken me through the judgement and order of the trial Court and the evidence adduced by the prosecution. The prosecution in this case has examined six witnesses. PW no.1 Bhairavnath Narsayya and the panch witnesses has prepared the seizure panchnama. PW no.2 PSI Shankar Khaire was a

member of the leading party. PW no.3 Dagu Deshmukh also was a member of the leading party who had lodged the complaint against the accused. PW no.4 Kashinath Desle was the muddemal clerk. PW no.5 Ramdas Arote carried samples of muddemal to the Chemical Analyser and PW no.6 Chandrakant Bankar is the Investigating Officer who proved the entries made in the station diary and also the other reports which were relied upon by the prosecution. The prosecution also produced Chemical Analyser's reports. One relating to the detection of opium and dry bhang and the other C.A. report was regarding detection of heroine. From the evidence of PW no.6, it can be seen that he has stated in his evidence that on the date of the incident, he received secret information that one Bashirkhan Abbaskhan Pathan was residing at Laxmi Apartment, Shingada Talao, Nashik was a dealer of Narcotics substances, was going to visit the Sarda circle at about 2.00 to 2.30 a.m. in the night. He has stated that he noted the information in writing, made station diary entry to that effect. The relevant extract was produced and marked Exhibit-28. Copy of the station diary was produced and marked Exhibit-29. Thereafter, he called the other witnesses, made entry in the

station diary, panchas were summoned. they were also informed about the secret information. Weighing scale and other necessary articles were called. Personal search of the leading party was taken. Entry was made in the station diary and at 2.30 a.m, the accused was apprehended was informed whether he wanted to be searched by a Gazetted Officer. The accused declined the offer which was given to him in writing. His signature was obtained. Plastic bag was searched and the contraband was seized. Samples were taken and they were sent to the Chemical Analyser. A favourable report was sent which clearly indicated that opium, dry bhang and heroine was seized from the accused. The house of the accused was also searched in presence of panchas. Panchnama was prepared. From his evidence, it can be seen that the necessary procedure had been followed before taking the search of the accused and the plastic bag which he was carrying. The Chemical Analyser’s report was also proved. The panch witnesses proved the panchnama. His evidence is corroborated by evidence of PSI Deshmukh and evidence of ASI Desle. The procedure as required u/s.42(2) have been followed to the hilt. Similarly, in my view, the provisions of

section 50 of the NDPS Act also have been followed and there is no lacunae in the prosecution case. Exhibit-19 is a written note on which the accused has signed. From the said note, it can be seen that the accused was informed that he had the right to have his search being taken before the Gazetted Officer or the Magistrate. the accused declined to accept the offer. Thus, the mandatory provisions of section 15 have been followed.

5. Though from the record it can be seen that the material which was seized from the possession of the accused was not produced before the Magistrate. Yet, it cannot be said that on account of this lacunae on the prosecution case, the entire prosecution evidence should be discarded. It has now been held that the provisions of section 52 are merely directory in nature and are not mandatory. In the present case, therefore, the prosecution has proved beyond reasonable doubt that the accused have committed the said offence in which he was charged. The finding of the trial Court therefore, will have to be confirmed.

6. Appeal is therefore dismissed. Conviction

is confirmed.

V.M. KANADE, J